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No. _____

In The

Supreme Court of the United States

CITY OF LOS ANGELES,

Petitioner,

vs.

EDWIN F. DAVID, *etc.*,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the United States Constitution require that a hearing to contest the imposition of a $134.50 towing charge invariably be supplied within 48 hours after a traffic violator's demand?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

EDWIN F. DAVID, an individual, on behalf of himself and a class of all persons similarly situated;

CITY OF LOS ANGELES, a municipal corporation.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

David v. City of Los Angeles, 307 F.3d 1143 (9th Cir. October 9, 2002). Appendix A-1.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on October 9, 2002. Appendix A-1. Petitioner City of Los Angeles ("City") seeks review of that judgment on a writ of certiorari.

On October 21, 2002, the City timely filed a petition for rehearing en banc in the Court of Appeals. On November 21, 2002, the Court of Appeals filed an order denying both a petition for rehearing and the petition for rehearing en banc. Appendix A-27. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

On August 13, 1998, an officer of the City's Department of Transportation found a motor vehicle owned by appellant EDWIN F. DAVID ("David") to be illegally parked. The officer ordered the vehicle towed and stored. Later the same day, David found his vehicle missing, located it at the City's impound station, and paid $134.50 in impound fees to recover it. Appendix A-3.

David asked for a hearing to contest the validity of the tow and of the impound fees. The City scheduled a hearing on September 9, 1998. Shortly before the scheduled hearing, the City informed David by telephone that the officer who had ordered the tow was unavailable on September 9, 1998, and that David could either proceed with the hearing without the officer or could cause the hearing to be continued. David chose to proceed on September 9. Appendix A-3.

The hearing examiner took notice of the officer's report, and found that probable cause existed for ordering the tow and that the impound fees were valid. David filed an action under 42 U.S.C. § 1983 to contest the hearing result on several constitutional grounds. The district court, holding jurisdiction under 28 U.S.C. §§ 1331 and 1343, granted summary judgment for the City, Appendix A-16, and David appealed. Appendix A-4.

The Court of Appeals, holding jurisdiction under 28 U.S.C. § 1291, filed its opinion on October 9, 2002. Appendix A-1. The clerk entered judgment on the same date. The City petitioned the Court of Appeals for rehearing en banc, and on November 21, 2002, the Court of Appeals filed an order denying rehearing and rehearing en banc. Appendix A-27.

The Court of Appeals majority holds that the delay between the August 13, 1998 tow and the September 9, 1998 hearing "appears to be in violation of state law", and "is a violation of the United States Constitution." Appendix A-5. In other words, the court holds that the Constitution requires that a post-deprivation hearing be held sufficiently soon after a demand – 48 hours in this case – even if the violator, by reason of paying the impound fees immediately, is no longer suffering a deprivation of the towed vehicle. Thus, although the City has deprived a violator, at most, of his money – in this case $134.50 – and the violator has made no showing that the money was needed for living expenses, Appendix A-13, n.1, Kozinski, J., dissenting, the court nevertheless insists that the United States Constitution compels an impound hearing within 48 hours of demand.

This result conflicts with the flexible balancing test prescribed by the Supreme Court for post-deprivation hearing cases in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and numerous other cases. Applying *Mathews* to the facts presented here, the hearing that the City provided was constitutionally timely, and the district court's judgment should therefore have been affirmed in all respects.

The Court of Appeals majority's position conflicts with that taken by the Fifth Circuit in *Breath v. Cronvich*, 729 F.2d 1006 (5th Cir. 1984), where the court reasoned that if the owner's interest in the recovery and continued use of his vehicle is accommodated, and if the procedure used by the government allows for recovery of any funds posted in the event of an error in the initial towing decision, then due

process is satisfied by a delayed hearing to contest the government's temporary hold on the owner's money.

In addition to the inconsistency of the Court of Appeals majority's opinion with relevant Supreme Court authority and its conflict with another circuit's decisional law, the result will lead to large unnecessary expenditures of public funds to supply hearings within 48 hours of demand to thousands of persons who have not been deprived of their vehicles, of their livelihoods or of their living expenses.

The City asks that this Court grant its petition for a writ of certiorari to conform the Court of Appeals decision to existing Supreme Court authority, to harmonize the Court of Appeals result with the decisional law of other circuits and to correct a result that, if undisturbed, will lead to a misapplication of scarce public resources.

ARGUMENT

A. The Court of Appeals Decision Fails to Follow an Opinion of the Supreme Court and Conflicts with an Opinion of Another Circuit Court.

Because the Court of Appeals majority decision prescribes a rigid constitutionally-based requirement that all California post-deprivation impound hearings take place within 48 hours after a motorist's demand, regardless of whether the violator has redeemed his vehicle, regardless of whether the violator has been deprived of living expenses or of the means to secure his livelihood, regardless of the advantages of a delayed hearing and regardless of the burden and cost of supplying the hearing

within the limited period demanded, the Court of Appeals majority decision conflicts with existing and well-established Supreme Court doctrine and with published case authority from another circuit calling for a flexible approach to the issue. Such a flexible approach compels a result opposite to that reached by the Court of Appeals.

1. The Court of Appeals Decision Fails to Follow an Existing Supreme Court Opinion.

In *Mathews v. Eldridge*, *supra*, this Court analyzed a social security recipient's claim that his benefits had been terminated after the Government, without a hearing, had determined that he no longer suffered from a continuing disability. After defining the flexible nature of due process requirements in property deprivation cases, the Court reversed the issuance of an injunction that had required an evidentiary hearing before social security benefits could be terminated. *Mathews v. Eldridge*, *supra*, 424 U.S. at 326, 96 S.Ct. 893, 47 L.Ed.2d 18.

The Supreme Court has repeatedly stated that "some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333; *Wolff v. McDonnell*, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). *See, e.g., Phillips v. Commissioner*, 283 U.S. 589, 596-597, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). *See also Dent v. West Virginia*, 129 U.S. 114, 124-125, 9 S.Ct. 231, 32 L.Ed. 623 (1889). Whether the evidentiary hearing must precede or may follow the deprivation, how much delay is permissible before a post-deprivation hearing must be supplied and the nature of the hearing provided are all subject to the familiar maxim that "[t]he fundamental requirement of due process is the opportunity to be heard 'at

a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, *supra*, 424 U.S. at 333, 96 S.Ct. 893, 47 L.Ed.2d 18; *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914).

The *Mathews* Court concluded that "[t]hese decisions underscore the truism that [d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). [D]ue process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)." *Mathews v. Eldridge*, *supra*, 424 U.S. at 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (internal quotation marks omitted).

The *Mathews* Court decided that the resolution of the issues before it required consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Id.* at 334-335, 96 S.Ct. 893, 47 L.Ed.2d 18.

The Court of Appeals majority's decision here failed to evaluate any of the three *Mathews* criteria. If it had, it would necessarily have concluded that the timing of the hearing that the City provided to David here met all established due process requirements.

First, David's private interest that is affected by the official action is simply his desire to recoup his $134.50. As Judge Kozinski expressed in his dissent, "money used to

redeem a car does not thereby become a car; money is money, no matter what use it's been put to." Appendix A-15 (Kozinski, J., dissenting).

Second, the risk of an erroneous deprivation of such interest through the procedures used is nonexistent. Money has time value that can be computed. Whether David recovers his $134.50 within 48 hours, within a month or after a year or more simply adds the question of how much interest must ultimately enhance the recovery. A hearing provided after each party has had a reasonable opportunity to marshal its evidence – an opportunity not ordinarily available within 48 hours – is more likely, not less likely, to yield an accurate and ultimately just result. The Court of Appeals majority fails to evaluate, much less to conclude, that the delay in supplying a hearing to David affected in any way the fundamental fairness of his hearing or the accuracy of the hearing result.

This is not to say that a motorist's interest in money is always of little or no importance. If the violator were impecunious, if the money were needed to supply the necessities of life, or if the impound fees were otherwise substantial in amount relative to the motorist's resources, a speedy hearing might well be required by due process. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). But none of those factors is present in the record here, and this case should not be decided on the basis of the process that may be due to another violator on another day. See *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

It is of at least passing interest that in California a person arrested for crime must be taken before a magistrate without unnecessary delay, and in any event within

48 hours after arrest, not including Sundays and court holidays. California Penal Code § 825. In other words, according to the Court of Appeals majority, the Constitutional requirement of a hearing to contest a towing charge, even where the motorist has redeemed his vehicle and only a right to money is in issue, holds at least the same legal moment as a custodial prisoner's right to a speedy arraignment. And perhaps it holds even greater importance: the Court of Appeals majority makes no allowance for Sundays and court holidays, and thus apparently imposes a Constitutional requirement on municipalities to supply towing charge hearings to argue about rights to money while custodial prisoners languish in their cells.

Finally, the City's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail, is considerable and may be prohibitive here. The City conducts more than a thousand vehicle impound hearings annually. See Appendix A-13 (Kozinski, J., dissenting). The City routinely supplies impound hearings within 48 hours of the demand to persons who are unable, due to indigency, to redeem their vehicles. But such hearings constitute only about five percent of all hearings conducted. The other 95 percent are provided to persons such as David, who have recovered their vehicles by advancing the impound fees and who seek only the recovery of those fees.

An impound hearing within 48 hours of the violator's demand requires the scheduling of the traffic officer who ordered the tow, of a hearing examiner and of the administrative staff needed to conduct the hearing. Often a replacement must be found to perform the customary duties of the traffic officer who has been summoned to testify. The coordination of these elements entails the

expenditure of public funds and other scarce resources. If such expenditures were necessary to the City's due process obligations – as they surely are where a violator is deprived of his motor vehicle – then the government should legitimately bear them. But in David's case, where the violator seeks only the recovery of a small amount of money, these costs are not justified, and a decision holding that the United States Constitution requires them should be reexamined.

2. The Court of Appeals Decision Conflicts with the Fifth Circuit's Approach to This Issue.

The City has not located any court of appeals decision holding, as the Court of Appeals majority does here, that due process inflexibly requires a hearing within 48 hours of demand where only money – not the use of the violator's automobile – is in controversy.

The Fifth Circuit in *Breath v. Cronvich*, *supra*, adopted the position the City advocates here. In *Breath*, a municipality had impounded the plaintiffs' vehicles under a Louisiana statute after traffic enforcement officials had concluded that the cars were parked illegally and after the officers were unable to locate the owners in the immediate vicinity. Under Louisiana's impoundment statutes, the owners could recover their vehicles either by posting an appearance bond or by paying the towing and storage charges, but if they chose the latter alternative, there would be no refund, even if the owner successfully contested the legality of the parking ticket.

Citing and applying *Mathews v. Eldridge*, *supra*, the *Breath v. Cronvich* court held that this procedure meets all of the requirements for due process. The court noted that

the relevant statute permits an owner to obtain his vehicle without paying the towing and storage charges simply by posting an appearance bond in the maximum amount of the penalties and charges. *Breath v. Cronvich*, *supra*, 729 F.2d at 1011. Thus, by obtaining an appearance bond, a person could have possession of his car until a hearing on the merits of the traffic ticket can be held.

> "This bond procedure, combined with the hearing on the merits of the ticket, affords adequate due process protection. The procedure protects the government's interest in retaining security for the owner's payment of towing and storage fees, and also protects the vehicle owner's interest in the uninterrupted use of his automobile."

Id. In other words, as long as the owner's interest in the recovery and continued use of his vehicle is accommodated, and provided that the procedure allows for recovery of any funds posted in the event of an error in the initial towing, then the factors that would otherwise militate for a speedy post-deprivation hearing are not present, and due process is satisfied by a delayed hearing to contest the government's temporary hold on the owner's money.

All of the elements that the *Breath v. Cronvich* court demanded are present in the record here. The City submits that the Fifth Circuit's approach to the question before the court accommodates more fully than the Court of Appeals majority the legitimate interests of both the vehicle owner and the government. Additionally, the *Breath* result follows from the Supreme Court's teachings in *Mathews v. Eldridge*, *supra*, and a decision consistent with it is accordingly more likely to yield harmony among the Circuits.

B. The Proceeding Involves a Question of Exceptional Importance, in that the Result, If Undisturbed, Will Lead to Significant and Unnecessary Expenditures of Public Funds to Supply Hearings Within 48 Hours After the Violator's Demand to Thousands of Persons Who Have *Not* Been Deprived of Their Vehicles, of Their Livelihoods or of Their Living Expenses.

The deprivation by government of a person's motor vehicle is a momentous event in a society that demands the rapid movement of persons to and from their homes and sources of livelihood. Such a deprivation may cause, at a minimum, significant disruption of one's ability to function in a commercial world. See *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977); *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1324 (9th Cir. 1982). But David's case is not about the loss of his motor vehicle; it is about the loss of his $134.50. And the determinative question presented to this Court is whether the United States Constitution requires that a hearing to contest the deprivation of $134.50 towing charge must be supplied under all circumstances within 48 hours after a traffic violator's demand.

As explained above, providing an impound hearing within 48 hours after the violator's demand requires the scheduling of the traffic officer who ordered the tow, of a hearing examiner and of the administrative staff needed to conduct the hearing, as well as the replacement of the traffic officer in the field. The coordination of these elements is a significant public expense, legitimately borne by government in the five percent of cases where the violator has been deprived of his vehicle and is unable to redeem it, due to poverty or to other lack of resources. But

in the other 95 percent of cases, such as David's, where a small amount of money is the only property in controversy, the demands of due process simply do not compel the inflexible approach mandated by the Court of Appeals majority.

Review of the Court of Appeals decision through a writ of certiorari will yield a result for these litigants and for others that conforms to the teachings of the Supreme Court, that restores harmony to the Circuits and that preserves fundamental notions of ordered government.

Respectfully submitted,

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Attorneys for Petitioner City of Los Angeles

February 2003

APPENDIX

EDWIN F. DAVID, on behalf of himself and a class of all persons similarly situated, Plaintiff-Appellant, v. CITY OF LOS ANGELES, Defendant-Appellee.

No. 00-57091

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

307 F.3d 1143; 2002 U.S. App. LEXIS 21067; 2002 Cal. Daily Op. Service 10261; 2002 Daily Journal DAR 11849

July 8, 2002, Argued and Submitted, Pasadena, California

October 9, 2002, Filed

PRIOR HISTORY:

D.C. No. CV-99-05602-RSWL. Ronald S.W. Lew, District Judge, Presiding.

DISPOSITION:

Affirmed in part, reversed in part, and remanded.

COUNSEL:

William A. Kent, Irvine, California, for the plaintiff-appellant.

Renee J. Laurents, Office of the City Attorney, Los Angeles, California, for the defendant-appellee.

JUDGES:

Before: Alex Kozinski and Ferdinand F. Fernandez, Circuit Judges, and Samuel P. King,* District Judge. Opinion by Judge Fernandez; Dissent by Judge Kozinski.

OPINION BY:

Ferdinand F. Fernandez

OPINION:

FERNANDEZ, Circuit Judge.

Edwin David brought this action on the basis that the procedures used by the City of Los Angeles after a car has been towed and stored for an alleged parking violation do not comport with the demands of due process. *See* U.S. Const. amend. XIV, § 1. The district court granted summary judgment against David and in favor of the City. We affirm in part and reverse and remand in part.

BACKGROUND

On August 13, 1998, David had a doctor's appointment at an office on Olympic Blvd. in the City of Los Angeles. He found a parking place on that street and parked his car there at approximately 2:30 p.m. He expected to get back fairly quickly, but, as it turned out, he did not return to the place where he expected to find his car until 3:15 p.m. Alas, his car was not there; he had parked it in an area where parking was not permitted

* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

between 3:00 p.m. and 7:00 p.m., and an officer of the City's Department of Transportation had ordered it towed.

While there were signs posted which gave notice of the restriction and warned that vehicles in violation of the restriction could be towed, David says he did not see the signs, one of which was just five feet away from his car. He claims that there were other vehicles in the way and tree limbs that blocked his vision from inside the car when he parked, and that he was distracted by a person who commented upon his automobile after he got out of it.

At any rate, David went to the impound station that very day, paid $134.50 to spring his car, and asked for a hearing. He was given a form, which he took to the Department of Transportation building forthwith. Five days later, David was sent another request form, and promptly returned that form to the Department of Transportation. Thereafter, he was notified that a hearing was scheduled for September 9, 1998.

Before he left to go to the hearing, he was called, told that the officer could not be there, and informed that he could have an extension if he desired. He did not so desire. Instead, David went to the hearing hoping to confront the officer (or get the case dismissed), but, as he had been warned, the officer was not there. David was told that he could either proceed without the officer, or have the hearing continued to a later date when the officer could be made available. David chose to proceed.

The hearing examiner, an employee of the Department of Transportation, took notice of the report of the officer, who had ordered the towing of David's vehicle, and listened to David's explanation. David did not actually dispute that his car had been parked in the restricted zone

beyond the 3:00 p.m. deadline, but offered certain explanations. The examiner found probable cause to tow the vehicle and no viable defense to what the officer had ordered. Thus, the examiner ruled against David, who was told that he could file a claim with the City Clerk if he was not satisfied with the result. David did that, but his claim was rejected. He then commenced this action under 42 U.S.C. § 1983 on the basis that the procedure used by the City violated his federal constitutional rights in a number of respects. The district court granted summary judgment against him, and this appeal followed.

STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *See Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 816, 151 L. Ed. 2d 700 (2002). We also review de novo the claim that the procedures used violated David's constitutional rights. *See Dittman v. California*, 191 F.3d 1020, 1024-25 (9th Cir. 1999); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998).

DISCUSSION

David does not claim that he was not over-parked. What he does assert is that his procedural due process rights were violated in a number of particulars. He argues that the post-towing hearing was delayed too long; that he was denied the right to cross-examine the officer who ordered the towing and storage; that the hearing examiner was biased as a matter of law because he works for the Department of Transportation, as did the officer who ordered the towing; that the burden of persuasion was

improperly shifted to him; that evidence was not delivered to him; and that he did not receive a proper notification regarding his appeal rights. We will consider each of these, although only the first of them requires extended discussion.

A. *The Hearing Delay*[1]

It is apparent, as David argues, that the City set a hearing for a number of weeks after his car was towed on August 13, 1998, despite David's insistent and immediate demand that he be given a hearing forthwith. That appears to be in violation of state law; more importantly, it is a violation of the United States Constitution.

We faced this issue twenty-five years ago in a case where the City of San Francisco towed and stored the plaintiffs' automobiles, and they objected to the lack of an expeditious procedure to attack those actions. *See Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1340-41 (9th Cir. 1977). The city had attempted to deflect that attack by providing that certain people, those who could not afford towage fees, could get a hearing within five days after notifying the city of that fact. *Id.* at 1341. We were not impressed with that limited concession.[2] We

---

[1] The district court did not actually consider this claim because it did not believe that the claim was encompassed by the pleadings. We disagree. At root, one aspect of David's claim was, and is, that the State's statutes and the City's procedures unduly delay post-towing hearings.

[2] However, we mentioned that, "the fact that San Francisco has undertaken to provide a hearing in some circumstances suggests that it is neither unduly burdensome nor unduly costly to do so." *Id.* at 1343 (footnote omitted).

did take note of its limited applicability, *see id.* at 1344 n. 21, but declared:

> Seizure of property without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause. . . .
>
> An early hearing, on the other hand, would provide vehicle owners the opportunity to test the factual basis of the tow and thus protect them against erroneous deprivation of the use of their vehicles. . . . We conclude, therefore, that [the state statute] does not comply with due process requirements.
>
> Nor is the statute saved by the San Francisco ordinance. A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle.

Id. at 1344 (footnotes omitted). In *Stypmann,* we were most concerned with the fact that the automobile itself would be held unless and until the fees were paid, but did not declare that the payment of those fees would elide the requirement of a prompt hearing. Rather, we spoke more generally.

California thereafter adopted a statute that responded to our concerns. It provides that once a vehicle is ordered stored by "an authorized member of a public agency," the agency shall provide the owner with "the opportunity for a post-storage hearing." Cal. Veh. Code § 22852(a). The agency must give the owner notice within 48 hours, Cal.

Veh. Code § 22852(b), and the owner may request a hearing. Cal. Veh. Code § 22852(b)(4). "The poststorage hearing shall be conducted within 48 hours of the request, excluding weekends and holidays. The public agency may authorize its own officer or employee to conduct the hearing if the hearing officer is not the same person who directed the storage of the vehicle." Cal. Veh. Code § 22852(c). It should be noted that this statute also speaks generally, and does not limit its protections to those who have not put up the fees necessary to release their vehicles from storage.

We returned to the fray in 1982, when another irate citizen, whose automobile had been impounded by the City of Los Angeles, sued. *See Goichman v. Rheuban Motors, Inc.,* 682 F.2d 1320, 1322 (9th Cir. 1982). Goichman's car had been towed and stored at the direction of an officer. Goichman went to the storage facility to demand its return, but was told that he had to pay towing and storage fees. He paid them, his car was released, and he brought a civil rights action. *Id.*

We did not reject Goichman's claim out of hand on the basis that he had paid the fees and obtained release of the vehicle. Rather, we saw the question before us as "whether the post-seizure hearing provided by section 22852 of the California Vehicle Code and the Los Angeles ordinance is sufficiently prompt to satisfy due process requirements." *Id.* at 1324. We answered that question in the affirmative and opined: "Balancing the governmental and private interests at stake, we hold that provision for a post-seizure hearing within forty-eight hours satisfies the requirements of due process." *Id.* at 1325. While this does amount to a ruling that the state statute is constitutional, it does not help the City, which did not follow the statute.

Nevertheless, the City takes the position that it need not adhere to the statute, or to our opinions about due process. It comforts itself with the reflection that Goichman "refused to pay the towing fees," and brushes the case aside on that basis. It adds, "[t]he court there held that the challenge to the towing must be conditioned upon the payment of the impound fees." That is the veriest nonsense. As we said, "Rheuban conditioned return of the automobile on payment of $32.00 in towing charges and $4.50 in storage charges. Goichman paid the charges, and Rheuban released the vehicle." *Id.* at 1322. Moreover, as to payment of fees, what we said was that due process did not require "return-on-demand." *Id.* at 1324. We then approved of conducting a hearing as long as forty-eight hours after the seizure.

What is clear is that the City cannot point to the slightest possibility that it has met the five day limit we set out in *Stypmann,* much less the 48 hours standard of state law. In other words, the long delay amounts to a violation of due process. We, therefore, reverse the district court's grant of summary judgment in this respect. If anyone were entitled to summary judgment on this issue and this record, it would be David.

B. *Other Claims*

David's other constitutional claims are of less moment and merit, and we may dispose of them more sententiously.

He asserts that he was denied the right to cross-examine the officer who issued the towing order. But cross-examination is not, in every instance, a sine qua non of due process. It all depends on the situation. *See, e.g.,*

Travers v. Shalala, 20 F.3d 993, 998 (9th Cir. 1994); *Nash v. Auburn Univ.,* 812 F.2d 655, 663-64 (11th Cir. 1987); *Farrow v. United States,* 580 F.2d 1339, 1353 n. 25 (9th Cir. 1978). There is no real dispute that David's car was parked after 3:00 p.m. in an area that provided for towing after that hour. He could hardly deny that, and when asked what he would have expected to cross-examine on, David essentially mentioned many irrelevancies, like, do you get a bonus or a trip to Las Vegas, did you worry about where the owner was, is there no respect, why is it like a computer? He would also have questioned the officer's authority, but there is no indication in this record that the officer's authority was in doubt. More than that, the fact is that David was not lured into a useless trip to the hearing room. He was called in advance, and was given the option of having his hearing postponed so that the officer could appear. When David appeared anyway, he was again told that he could have a continuance or could go ahead without the officer. He chose the latter. His rights were not thereby violated. That is not to say that a City policy of regularly causing even further delays, or a waiver of rights, by failing to have the towing officer present would be proper, if the vehicle owner wanted him there. At the very least, it would bespeak a further evasion of the requirement of a prompt hearing. But no evidence of that is in this record.

David also asserts that the mere fact that the hearing examiner was employed by the agency – or the City – was sufficient to show a due process violation because the officer who ordered the towing and storage worked for the agency also. That simply is not the law. *See Withrow v. Larkin,* 421 U.S. 35, 46-50, 95 S. Ct. 1456, 1464-65, 43 L. Ed. 2d 712 (1975); *United States v. Garcia-Martinez,*

228 F.3d 956, 960-63 (9th Cir. 2000), *cert. denied,* 531 U.S. 1179, 121 S. Ct. 1158, 148 L. Ed. 2d 1018 (2001); *Spokane County Legal Servs., Inc. v. Legal Servs. Corp.,* 614 F.2d 662, 668 (9th Cir. 1980).

David next insists that his constitutional rights were violated because the burden of persuasion was shifted to him at the hearing. State law does provide that the burden of persuasion is upon the City as far as demonstration of a valid seizure of the vehicle is concerned. *See Smith v. Santa Rosa Police Dep't,* 97 Cal. App. 4th 546, 569, 119 Cal.Rptr.2d 72, 89-90 (2002). But this record does not show that the burden on that issue was shifted to David. Rather, the evidence showed probable cause to tow and store the vehicle, and David's evidence appears to be more in the nature of mitigation. That is an issue on which he would bear the burden of persuasion. *See id.* In any event, we have declared that in forfeiture proceedings, which are much like the proceeding at hand, although more Draconian, the shifting of the burden of persuasion to the owner is not a violation of due process once probable cause to seize the property is shown. *See United States v. $129,727.00 United States Currency,* 129 F.3d 486, 492-94 (9th Cir. 1997).

Next, David assaults the process used by the City by claiming that he was misdirected about his appeal rights. As a matter of fact, the City did inform him about the internal processes of the City, such as they were. They amounted to filing a claim for damages. Nothing the City said or did precluded David from selecting some other

route if he preferred,[3] and he points to no law or principle that required the City to outline all of the other possibilities either at or after completion of the post deprivation hearing, if there were any such possibilities.

David's final claim that evidence was withheld from him is of the same ilk as his appeal process claim. He presented nothing to the district court to demonstrate withholding of evidence. According to the record, the hearing examiner relied upon the report from the towing officer and upon the evidence submitted by David himself.

CONCLUSION

In David's eyes, the towing and storage of his automobile were directed by one of the City's myrmidons, and any decent public servant would have been more kindly. Perhaps his outrage has some basis; perhaps not. In any event, that does not affect the propriety of the towing of his car; nor does it suggest that the actual conduct of the post-storage hearing was defective.

However, we cannot gainsay David's assertion that the district court erred when it granted summary judgment on his claim that the City violated his due process rights when it failed to give him a prompt post-storage

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[3] David suggests that he could have brought an action for administrative mandamus. *See* Cal. Civ. Proc. Code § 1094.6. Perhaps so, but he points to nothing the City did which precluded him from doing so and, more importantly, he does not indicate that he even attempted to do so. We cannot say that an attempt would have been turned aside, if, as he says, the City set out to, and did, mislead him. *See Sinetos v. DMV,* 160 Cal. App. 3d 1172, 1177, 207 Cal.Rptr. 207, 210 (1984).

hearing upon demand. Our cases make that much clear. We are somewhat puzzled that twenty-five years after we pointed out the impropriety of undue delay, the problem is recrudescent. But puzzled or not, we are not in doubt. Our path is clear; we must reverse and remand for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED. David shall recover his costs on appeal. Appeal from the United States District Court for the Central District of California.

DISSENT BY:

Alex Kozinski

DISSENT:

KOZINSKI, Circuit Judge, dissenting.

The majority relies on *Stypmann v. City & County of San Francisco,* 557 F.2d 1338 (9th Cir. 1977), and *Goichman v. Rheuban Motors, Inc.,* 682 F.2d 1320 (9th Cir. 1982), which are cases involving cars. But this isn't a car case; David paid the impound fees and recovered his car the day it was towed. David wanted a hearing to get back his cash. The question before us is whether the city must provide a hearing within 48 hours to contest a $134.50 fine. Looking to the familiar balancing test of *Mathews v. Eldridge,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), the clear answer is no.

Mathews explains that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." 424 U.S. at 334 (internal quotation marks omitted). To make that determination, we look to the "governmental and private interests that are affected."

Id. Here, David's interest is only in money. Unlike some deprivations, where the passage of even a day or two can cause substantial and irreparable harm, money is fungible; a loss of money can normally be made up with more money.[1] And, being out $134.50 isn't much of a burden if you can pay the money in the first place.[2] If David hadn't paid the money to get his car out of hock, he could have demanded a hearing within 48 hours. Had the city failed to provide him a hearing within that time, David probably would have had a solid claim. But David did pay the money, so the only thing he lost was use of the $134.50 for a few weeks – not such a big deal.

The government interest in delaying the hearing, on the other hand, is quite substantial. It takes time to organize hearings: there are only so many courtrooms and presiding officials; the city has to contact the towing officer and arrange for his appearance; the city may have to find a substitute to cover that officer's responsibilities while he attends the hearing. *See Goichman,* 682 F.2d at 1324-25. And, the city must do this for hundreds, perhaps thousands, of claimants each month. Given the minimal private interest, I can't say that the city was required to drop everything and give David an immediate hearing for his $134.50.

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[1] The issue is different if the money is needed for living expenses. In such a case, a post-deprivation hearing – no matter how prompt – might not be adequate. Due process may require a *pre*-deprivation hearing. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).

[2] Whether David would have been entitled to interest had he prevailed before the hearing officer is a separate question.

The majority's reliance on our post-deprivation cases is misplaced. *Stypmann* was careful to explain that its holding turned on the heavy weight it assigned "the private interest in the uninterrupted use of an automobile." 557 F.2d at 1342; *see also id.* at 1342-43 ("A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed."); *id.* at 1344 ("A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle."). *Goichman* was no different. The focus of the inquiry, as in *Stypmann,* was a specific deprivation: the use of one's automobile. *See* 682 F.2d at 1324. *Stypmann* and *Goichman* did not set the rule for cars, money and all other property alike.

Of course, had David been stuck without his car because he couldn't pay the impound fees, the city's untimely hearing may have violated his due process rights. *See Stypmann,* 557 F.2d at 1344-45.[3] But David did pay the fees and so he wasn't deprived of his car. Simply because a system "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States v. Salerno,* 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). David may not raise the claims of others against whom the city's procedures might operate unconstitutionally. Unless David can show that the process *he* received – a hearing to

[3] On the other hand, had David left the car at the impound lot, the city may have given him a hearing more promptly, and so he may have had nothing to complain about. We can only speculate.

challenge the tow within a month after paying a fine to spring his car – was constitutionally deficient, he can't state a claim under section 1983.

The city's failure to give David a prompt hearing may well have violated state law. *See* Cal. Veh. Code § 22852(c). David may have been able to challenge this violation in state court. Whether the delay violated David's *federal* rights, however, is a different question, and one that requires "a sensitive inquiry into the competing governmental and private interests affected." *Goichman,* 682 F.2d at 1324. The majority mistakenly applies our cases involving deprivation of an automobile to the deprivation of a small sum of cash. But money used to redeem a car does not thereby become a car; money is money, no matter what use it's been put to. I see no authority for extending the car cases to this very different situation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWIN F. DAVID, Plaintiff, v. CITY OF LOS ANGELES, Defendants.	CV 99-05602 (MANx) RSWL **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Oct. 31, 2000)

Before the Court is Defendant City of Los Angeles's Motion for Summary Judgment. The motion was scheduled for oral argument before the Honorable Ronald S.W. Lew on October 23, 2000, but was removed from the Court's law and motion calendar pursuant to Rule 78 of the Federal Rules of Civil Procedure for disposition based on the papers filed. Having carefully considered all papers filed for and against the motion, the Court **GRANTS** Defendant's Motion for Summary Judgment.

I. BACKGROUND

On August 13, 1998, Plaintiff parked his car in a "no stopping" zone on Olympic Boulevard in Los Angeles. At the direction of Defendant, Hank's Wilshire Tow towed Plaintiff's car to its impound station. Plaintiff went to the impound station and retrieved his car at the cost of $134.50. An employee of Hank's Wilshire Tow gave Plaintiff a copy of the vehicle impound report prepared by the tow truck driver (hereafter the "vehicle impound report") and told Plaintiff that his vehicle had been towed because it was parked in a "no stopping" zone.

Shortly after August 13, 1998, Plaintiff received a document in the mail advising him of his right to a hearing to challenge the impound. Plaintiff's impound hearing was scheduled for September 9, 1998. Sometime before September 9, 1998, Plaintiff received a phone call from a City employee notifying Plaintiff that the officer who authorized the towing of his vehicle was unable to appear on September 9, 1998, and the City employee offered Plaintiff the option of rescheduling the hearing. Plaintiff declined to reschedule.

At the hearing, Plaintiff was again told that the officer who authorized the towing of his vehicle was unable to appear. The hearing examiner gave Plaintiff the option of continuing the hearing without the officer or postponing the hearing to a date when the officer could appear. Plaintiff opted to continue the hearing without the presence of the officer.

At the hearing, the hearing examiner considered both Plaintiff's evidence and the vehicle impound report. After the hearing, Plaintiff received a copy of the hearing examiner's report finding against Plaintiff and forfeiting Plaintiff's towing and storage charges. The report did not mention anything regarding Plaintiff's right to appeal the hearing examiner's decision.

On May 28, 1999, Plaintiff filed an action against Defendant under 42 U.S.C. § 1983. Plaintiff alleged that Defendant violated his procedural due process rights and that Defendant implements policies and practices in violation of the Due Process Clause of the Fourteenth Amendment. Subsequently, Plaintiff filed a motion to certify a class of people similarly situated. The Court denied the motion.

In August 2000, Plaintiff filed a motion for summary judgment against Defendant. Defendant also filed a cross-motion for summary judgment against Plaintiff. The Court denied both motions.

Defendant again moves for summary judgment on the grounds that Defendant did not violate Plaintiff's procedural due process rights, and Plaintiff has failed to produce evidence that Defendant implements policies and practices that violate the Due Process Clause of the Fourteenth Amendment. Plaintiff opposes Defendant's Motion on the grounds that (1) California Vehicle Codes §§ 22851 and 22852 are unconstitutional, (2) Defendant failed to provide a hearing with an impartial hearing officer, (3) Defendant did not permit Plaintiff to confront and cross-examine his adversary, (4) Defendant failed to carry its burden of proof in showing that the impound was justified, (5) Defendant considered evidence obtained outside of the hearing, (6) Defendant failed to notify Plaintiff of his right to appeal the hearing examiner's final decision, (7) Defendant failed to disclose all of its evidence to Plaintiff before the hearing, (8) Defendant failed to enact an ordinance proscribing due process procedures during the hearing process, and (9) Defendant failed to notify Plaintiff of his right to challenge the impound.

II. DISCUSSION

A. Legal Standard, Summary Judgment

As the moving party, Defendant has the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party does not have the burden

of proof at trial on a dispositive issue, the moving party may meet its burden for summary judgment by showing an "absence of evidence" to support the non-moving party's case. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986).

The non-moving party, on the other hand, must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Id.* at 324. Conclusory allegations unsupported by factual allegations, however, are insufficient to create a triable issue of fact so as to preclude summary judgment. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (citing *Marks v. Department of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). A non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the [opposing party] on the evidence presented." *Anderson*, 477 U.S. at 255.

The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. In fact, the moving party need not produce any evidence at all on those matters. *Celotex*, 477 U.S. 317, 106 S. Ct. 2548, 2554 (1986).

B. Section 1983 and Municipal Liability

Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution or federal law.[1] To make

[1] Section 1983 provides:

Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the

(Continued on following page)

out a prima facie case under § 1983, plaintiffs must show that the defendants (1) acted under color of state law, and (2) deprived the plaintiffs of rights secured by the constitution or federal law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Borunda v. Richmond*, 885 F.2d 1384 (9th Cir. 1988); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988). "The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

Municipalities and their departments can be subject to liability under 42 U.S.C. § 1983 if the action that is alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978). An unofficial custom or policy may also give rise to liability. *Id.* at 690-91. A municipality or its department cannot be liable on a theory of *respondeat superior*. *Monell*, 436 U.S. at 691.

1. California Vehicle Code Sections 22851 and 22852

The fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319,

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United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress. . . .

42 U.S.C. § 1983.

333 (1976). Thus, some form of a hearing is required before an individual is finally deprived of a property interest. *Id.*

In his Opposition to Defendant's Motion, Plaintiff challenges the constitutionality of California Vehicle Code sections 22851 and 22852 by arguing that neither statute provides for sufficient process. Plaintiff made no allegations regarding the constitutionality of these statutes in his Complaint. Therefore, Plaintiff's attempted challenge at this late stage is not properly before this Court. For this reason, the Court declines to rule on the constitutionality of either statute.

2. Hearing Examiner

Plaintiff next argues that the hearing examiner was biased by virtue of his employment with Defendant. However, the law presumes that administrative adjudicators are impartial and honest. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). To overcome this presumption, Plaintiff must provide some evidence of bias. *Id.* Plaintiff has provided no evidence that the hearing examiner was biased.

3. Confronting and Cross-Examining the Officer

Plaintiff argues that the choice of whether to postpone his hearing or proceed with the hearing without confronting and cross-examining the officer denied him due process. Defendant has conceded that it has a policy and practice of presenting citizens with the same choice.

The Supreme Court stated in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), that "[i]n almost every setting where

important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Plaintiff, however, received such an opportunity: According to the undisputed facts, Plaintiff was given the choice of postponing the hearing to a date when the officer who authorized the impound could appear or proceeding with the hearing without confronting and cross-examining the officer. Plaintiff voluntarily opted to proceed with the hearing. Plaintiff has provided no evidence that he was coerced to continue the hearing despite the absence of the officer.

Plaintiff cites no legal authority for the proposition that the choice with which Defendant presented him – proceed or postpone – violated his right to due process. Nor has Plaintiff presented evidence tending to show that affording citizens this choice routinely results in unreasonable delays or deprivations of property. Indeed, Defendant offers this choice to citizens in the interest of *preserving* their rights to confront and cross-examine officers, an integral component of each person's right to due process in an adversarial setting. Therefore, as a matter of law, the Court concludes that Defendant's policy of presenting citizens with the choice of postponing an impoundment hearing until the impounding officer is available or proceeding without confronting and cross-examining that officer does not violate due process. Accordingly, *Monell* liability cannot be imposed upon Defendant on this basis.

4. Burden of Proof

Plaintiff alleges that at the hearing, Defendant did not carry its burden of proof in justifying the impound.[2] However, Plaintiff provides no evidence to support his allegation. The hearing examiner considered Plaintiff's evidence and the vehicle impound report. Thereafter, the hearing examiner concluded that Plaintiff's vehicle had been properly towed.

5. Evidence Outside of Hearing

Plaintiff alleges that the hearing examiner obtained evidence outside of the hearing. Plaintiff argues that by obtaining evidence outside of the hearing, the hearing examiner violated Plaintiff's due process rights. However, Plaintiff provides no evidence that the hearing examiner obtained evidence outside of the hearing.

6. Right to Appeal

Plaintiff alleges that the hearing examiner violated his due process rights by failing to inform Plaintiff of his right to appeal the decision of the hearing examiner. Plaintiff claims that pursuant to California Civil Procedure Code section 1094.6, Defendant was obligated to notify Plaintiff that he had 90 days after the agency rendered its final decision in which to seek judicial review of that decision.

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[2] California Vehicle Code section 22650(a) provides that the storing agency has the burden of establishing the authority for, and the validity of any removal of a vehicle.

Section 1094.6 has no application to the instant case. Rather, it applies to decisions involving suspensions, demotions, or dismissals of officers or employees; revocations or denials of applications for permits or licenses; and denials of applications for retirement benefits or allowances. The case now before this Court does not implicate any of the above situations. Therefore, the City was not obligated under California Civil Procedure Code section 1094.6 to provide Plaintiff with notice of his ability to seek judicial review of his claim.

7. Disclosing Evidence

There is no merit to Plaintiff's argument that the hearing violated his due process rights because Defendant failed to disclose to Plaintiff all the evidence it planned to use at the hearing. The hearing examiner based his decision upon Plaintiff's evidence and the vehicle impound report. According to the undisputed facts, Plaintiff received a copy of the vehicle impound report at the time he retrieved his vehicle. Thus, Plaintiff had knowledge of all the evidence presented at the hearing.

8. Enacting Ordinance

Plaintiff argues that due process required Defendant to enact an ordinance detailing the procedures to be followed in vehicle impound hearings. The cases cited by Plaintiff in support of his proposition provide that where deprivation of property is authorized by statute, the statute must provide for a right to notice and the right to

be heard before a person can be permanently deprived of his or her property.[3] Plaintiff was deprived of his car pursuant to California Vehicle Code section 22650 *et seq.* California Vehicle Code section 22852 provides parties with a right to notice and a right to be heard. Plaintiff provides no evidence or legal authority for his argument; therefore, the Court declines to find that due process required Defendant to enact an ordinance detailing procedures to be followed in vehicle impound hearings.

9. Right to Challenge Impound

Plaintiff's argument that he did not receive notice of his right to a hearing to challenge the impound is without merit. According to the undisputed facts, shortly after the day his vehicle was towed, Plaintiff received a document in the mail informing him of his right to request a hearing to challenge the impound.

III. CONCLUSION

Aside from setting forth general allegations, Plaintiff has provided no evidence or legal authority to support his claims of due process violations against Defendant. The Court therefore concludes that there are no triable issues of material fact in this case and Defendant is entitled to judgment as a matter of law. Accordingly, the Court hereby **GRANTS** Defendant's Motion for Summary

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[3] See e.g., *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915); *Central of Georgia R. Co. v. Wright*, 207 U.S. 127 (1907); *Security Trust & Safety Vault Co. v. City of Lexington*, 203 U.S. 323 (1906); and *Montana-Dakota Power Co. v. Weeks*, 8 F.Supp. 935 (D. ND 1934).

Judgment. The Court will adopt Defendant's Proposed Findings of Fact and Conclusions of Law, making any revisions it deems necessary.

IT IS SO ORDERED.

/s/ Ronald S.W. Lew
RONALD S.W. LEW
United States District Judge

DATED: October 31, 2000

No. CV 99-5602 (MANx) RSWL [*David v. City of Los Angeles*: Def.'s Mot. for Summ. Judg.]

(orders\david.msj)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWIN F. DAVID, on behalf of himself and a class of all persons similarly situated, Plaintiff-Appellant, v. CITY OF LOS ANGELES, Defendant-Appellee.	No. 00-57091 D.C. No. CV-99-05602-RSWL **ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC** (Filed Nov. 21, 2002)

Before: KOZINSKI and FERNANDEZ, Circuit Judges, and KING,[1] District Judge.

Judge Fernandez and Judge King have voted to deny the petition for rehearing. Judge Kozinski would grant the petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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[1] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.